BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBBIE S. COOK Claimant VS. **MAINLINE PRINTING, INC.** Respondent AND **OHIO CASUALTY COMPANY** Insurance Carrier	)	Docket No. 147,491

ORDER

ON April 12, 1994, the applications of the claimant and the respondent for review of an Award entered by Administrative Law Judge Floyd V. Palmer, dated January 28, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by and through her attorney, Frederick J. Patton, II of Topeka, Kansas. Respondent and its insurance carrier appeared by and through its attorney, James E. Benfer of Topeka, Kansas. There were no other appearances.

RECORD

The record considered on appeal is the same as that listed in the January 28, 1994, Award of Special Administrative Law Judge William F. Morrissey.

STIPULATIONS

The stipulations as listed in the January 28, 1994, Award of Special Administrative Law Judge William F. Morrissey are hereby adopted by the Appeals Board.

ISSUES

After taking stipulations, there remained two issues for decision by the Special Administrative Law Judge:

(1) Nature and extent of claimant's disability; and,

(2) Whether certain medical expense should be treated as unauthorized.

On appeal, both parties challenged the decision of the Special Administrative Law Judge regarding nature and extent of disability. Neither challenges the finding relating to medical expenses and the Appeals Board therefore adopts the finding of the Special Administrative Law Judge that the cost of the MRI examination should be treated as authorized.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After review of the entire record and consideration of the arguments by the parties, the Appeals Board finds claimant's permanent partial general bodily disability to be forty-five and one-half percent (45.5%).

Claimant suffered an injury to her low back arising out of and in the course of her employment on April 3, 1990. The injury occurred while she was moving a skid. She was treated initially by a chiropractor, Dr. Sullivant, and then was referred to Dr. Huston. He gave steroid injections and suggested she try returning to work. When she did, the back began hurting again. From the results of an MRI, Dr. Huston recommended, and later performed, surgery for a herniated disc at the L4-L5 level. The surgery was done in August 1990 and claimant was thereafter kept off work by Dr. Huston until December 1990. At that time, he released her to return with instructions that she should not overwork. Claimant did return several times but experienced difficulty in performing the duties. On each occasion, Dr. Huston again took her off work. On the last occasion, she was advised by her employer not to return until they called her. They did not, in fact, ever return her to work.

Claimant thereafter participated in a vocational rehabilitation plan which called for job placement. She testified that she applied for some eighty to one-hundred jobs. She was eventually offered a position at Pro-tel Marketing. This was a phone job that would require that she work six days per week. Dr. Huston indicated that he felt she should not work more than five days per week.

Both Dr. Huston and Dr. Prostic testified as to claimant's functional impairment and both recommended restrictions. Dr. Huston rated her impairment at eleven percent (11%) to the body as a whole. Dr. Prostic testified that, in his opinion, she has a twenty-two and one-half percent (22.5%) permanent partial impairment function to the body as a whole. Dr. Huston did, however, recommend restrictions somewhat more limiting than those recommended by Dr. Prostic. Dr. Huston recommended that she be limited to lifting twenty (20) pounds occasionally and ten (10) pounds frequently. He further indicated that she should be able to bend up to one-third of the time and that she could sit one-hundred percent (100%) of the time. Dr. Prostic, on the other hand, limited her to thirty-five (35) pounds single lift and fifteen (15) pounds repetitive lift. He indicated she should avoid frequent bending and twisting.

Based upon the record as a whole, the Appeals Board concludes that as a result of her injury, claimant was not able to return to work at a comparable wage. As a result, she is not limited to an award for functional impairment. She is entitled to a disability which considers the effect the injury will have on her ability to obtain employment and earn wages. K.S.A. 44-510e. This work disability is defined in K.S.A. 44-510e as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform

> work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation. . . ."

This definition of disability has been construed to require separate analysis of two factors: 1) loss of ability to perform work in the open labor market; and, 2) loss of ability to earn comparable wages. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

In this case, two experts testified regarding claimant's reduced ability to perform work in the open labor market and reduced ability to earn comparable wage. Michael Feekin testified that in his opinion the claimant has a twenty-five percent (25%) loss of ability to obtain employment in the open labor market and a ten percent (10%) loss of ability to earn comparable wage. Claimant contends that credibility of Mr. Feekin's testimony is undermined by the testimony he gives on cross-examination to such an extent that his testimony is not entitled to any weight. The Appeals Board agrees that the cross-examination does raise substantial question about the adequacy of the support for the opinions given. However, in the final analysis it appears that the methodology followed is sufficiently similar to commonly followed methodology and that the opinions themselves are sufficiently consistent with evidence otherwise in the record that Mr. Feekin's opinions should be given some weight.

There are, however, two aspects of the opinions by Mr. Feekin which the Appeals Board considers to require adjustments in the percentages. First, Mr. Feekin has not used the stipulated average weekly wage to determine the loss of ability to earn comparable wage. Following the approach indicated in Slack v. Thies Development Corporation, 11 Kan. App. 2d 204, 718 P.2d 310, rev. denied 239 Kan. 694 (1986), the Appeals Board believes the average weekly wage should be used as the pre-injury wage to which the projected post-injury wage should be compared. Mr. Feekin has projected a $6.60 per hour post-injury wage. When converted to a weekly wage and compared to the pre-injury wage, the result is a twenty-two percent (22%) loss of ability to earn a comparable wage rather than the eleven percent (11%) given in Mr. Feekin's deposition. In weighing Mr. Feekin's opinions, the twenty-two percent (22%) will, therefore, be the wage loss factor used.

It appears Mr. Feekin also calculated somewhat differently the loss of ability to perform work in the open labor market. In arriving at his opinion that the loss is twenty-five percent (25%), he has assumed that claimant's pre-injury open labor market should include all jobs regardless whether they were open to someone with her education, training, and experience. According to Mr. Feekin, there would have been some nearly 88,000 jobs in the relevant open labor market. He acknowledges that even prior to her injury she was employable in only approximately 44,000 of those jobs. From the injury she lost the ability to perform approximately 22,000 jobs and remains employable after the injury in approximately 22,000. By comparing the 22,000 jobs lost to the 88,000 total jobs, he arrives at the twenty-five percent (25%) loss of ability to perform work in the open labor market. The Appeals Board believes that the correct calculation should consider that her pre-injury open labor market to be approximately 44,000. If post-injury her labor market is reduced to 22,000, her loss is, therefore, fifty percent (50%) rather than twenty-five percent (25%) suggested in his report. The fifty percent (50%) loss of access to the open labor market will, therefore, be the factor used when weighing his opinion.

Mr. Vogenthaler testifies that in his opinion claimant's ability to perform work in the open labor market is reduced by eighty-three to ninety-three percent (83-93%). In his

opinion, her ability to earn comparable wage is reduced by sixty-four to seventy-four percent (64-74%). Again, there are differences between the method used by Mr. Vogenthaler to arrive at the reduced ability to earn wage, and the method more commonly accepted in prior Appeals Board decisions. He calculates loss of ability to earn wage by projecting wage loss over expected work life. From the injury he projects that claimant's work life will be reduced. As a result, he concludes that over the full work life the ability to earn a comparable wage will be reduced by the sixty-four to seventy-four percent (64-74%) previously indicated. However, he projects an initial post-injury wage which would show an 11.3% loss. Without suggesting that it would never be appropriate to calculate wage loss by comparison over an extended period of time, the Appeals Board finds that Mr. Vogenthaler's opinion in this case should not be given weight as his conclusions in this regard are not reasonably supported.

The 11.3%, on the other hand, again fails to be compared to the stipulated pre-injury average weekly wage. As with Mr. Feekin's opinion, the 11.3% becomes twenty-two percent (22%) loss of ability to earn comparable wage when Mr. Vogenthaler's projected post-injury wage in fact is compared to stipulated pre-injury average weekly wage. As a result, when weighing Mr. Vogenthaler's opinions the Appeals Board believes it most appropriate to use twenty-two percent (22%) as the loss of ability to earn a comparable wage factor and eighty-three to ninety-three percent (83-93%) as his opinion on loss of ability to perform in the open labor market.

The Special Administrative Law Judge has rejected all of Mr. Vogenthaler's opinions because of his one opinion based upon projected work life. The Appeals Board does not believe that the fact that Mr. Vogenthaler has followed that theory is grounds to reject all opinions given by Mr. Vogenthaler. The Appeals Board does, however, believe that his limitations to sedentary work is not supported by the restrictions recommended. On the other hand, Mr. Feekin's opinions appear to provide a lower than appropriate assessment of the disability. The Appeals Board believes it is appropriate in this case to split the two ratings by the two experts. As a result, the Appeals Board finds that claimant has a twenty-two percent (22%) loss of ability to earn comparable wage based upon opinions given by both experts. By splitting the opinions on loss of ability to perform work in the open labor market, the Appeals Board finds that claimant has a sixty-nine percent (69%) loss of ability to perform work in the open labor market. When those two factors are averaged, as authorized in Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990), the result is a forty-five and one-half percent (45.5%) general bodily disability which the Appeals Board finds to appropriately reflect claimant's disability in this case.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Special Administrative Law Judge William F. Morrissey, dated January 28, 1994, is hereby modified by increasing claimant's award.

AN AWARD IS, THEREFORE, HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Debbie S. Cook, and against respondent, Mainline Printing, Inc., and its insurance carrier, Ohio Casualty Company, for an accidental injury which occurred on April 3, 1990, based upon an average weekly wage of $337.94 for 65 weeks of temporary total disability at the rate of $225.30 per week in the sum of $14,644.50, 3 weeks of temporary partial disability compensation at the rate of $113.23 in the sum of $339.68 and 347 weeks of compensation at the rate of $102.51 in the sum of $35,570.97 for a 45.5% permanent partial general bodily work disability making a total award of $50,555.15.

As of August 26, 1994, there is due and owing claimant $14,646.50 in temporary total compensation, $339.68 in temporary partial compensation, and 161.57 weeks of permanent partial compensation at the rate of $102.51 per week in the sum of $16,562.54 making a total due and owing of $31,546.72.

The remaining 185.43 weeks are to be paid at the rate of $102.51 per week until fully paid or further order of the director.

Claimant's contract of employment with her counsel is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are assessed to the respondent to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Appino & Achten Reporting Service	
Transcript of Preliminary Hearing	$116.00
Deposition of Joseph W. Huston, M.D. (2/24/93)	$118.35
Deposition of Michael Feekin	$394.50
Braksick Reporting Service	
Transcript of Regular Hearing	$160.02
William V. Denton	
Deposition of Edward J. Prostic, M.D.	$98.30
Deposition of Donald R. Vogenthaler	$377.20
Waters Court Reporting Service	
Deposition of Joseph W. Huston, M.D. (6/16/93)	$65.90

IT IS SO ORDERED.

Dated this ____ day of August, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frederick J. Patton, II, 3601 SW 29th St., Topeka, KS 66614
James E. Benfer, 1400 S. Topeka Blvd., Topeka, KS 66612
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director